UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BOUCHER BOYS & THE INDIAN, INC.,	***)***	
Plaintiff	***)***	
v.	***)***	***Docket No. 96-143-P-DMC***
FLEET FINANCIAL GROUP, INC., et al.,	***)***	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT[1]

Defendants Fleet Financial Group, Inc. ("FFG") and Fleet Bank of Maine ("FBOM") have filed motions for summary judgment on all remaining claims asserted against them in this action. Defendants Bates Fabrics, Inc. and Bates of Maine, Inc. (collectively "Bates") move for summary judgment on all but the breach of contract claim asserted against them. I grant the motions in part and deny them in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The plaintiff, Boucher Boys & the Indian, Inc. ("BBI"), is an Arizona corporation owned by David Boucher, Jerome Boucher, and David Dozier. Deposition of BBI by David F. Boucher

("Boucher Dep."), submitted with Statement of Material Facts in Support of Motion for Summary Judgment by Defendants Fleet Financial Group and Fleet Bank of Maine, Inc. ("Fleet SMF") (Docket No. 25), at 3-4. Dozier is one-quarter American Indian by blood. Deposition of BBI by David C. Dozier ("Dozier Dep."), submitted with Fleet SMF, at 4. BBI is in the business of designing, manufacturing and marketing woolen blankets with distinctive Pueblo Indian Nation designs. Boucher Dep. at 5, 9. BBI selected Bates as the actual manufacturer of these items. Dozier Dep. at 87.

After Bates agreed to manufacture the blankets, BBI approached FBOM for financing. *Id.* FBOM extended a secured line of credit in the amount of $250,000 to BBI in May 1993. Affidavit of Kenneth E. Additon ("Additon Aff."), Docket No. 26, ¶¶ 2, 4. A then part owner of Bates and a representative of the City of Lewiston introduced BBI to FBOM. Boucher Dep. at 9-10; Deposition of Alfred J. Lebel ("Lebel Dep."), submitted with Fleet SMF, at 4. In December 1993 the line of credit was increased to $350,000 at BBI's request. Addition Aff. ¶ 3. In the fall of 1994, in order to make a portion of the collateral securing the line of credit available to David Boucher, the financing was restructured, in part by maintaining $275,000 as a line-of-credit facility and converting $75,000 into a term loan. Additon Aff. ¶ 4.

Alfred Lebel is president of Bates and was part owner of Bates at the time of the original agreement with BBI. *Id*. at 3-4. He subsequently became sole owner of Bates. *Id.* at 4. FBOM is a bank with a branch in Lewiston. Deposition of Kenneth E. Addition ("Additon Dep."), submitted with Fleet SMF, at 4. Kenneth Addition is a vice president and loan officer who works out of the Lewiston branch. *Id*. His supervisor at all relevant times was Gillian Sloat, a senior vice president of FBOM working out of the Portland office. Plaintiff's Response to FBOM's Request for

Production of Documents, submitted with Fleet's SMF, Exh. C; Deposition of Gillian N. Sloat ("Sloat Dep."), submitted with Fleet SMF, at 14. At all relevant times, Paul McConnell was president and CEO of FBOM. Sloat Dep. at 16.

Initially, Bates was authorized to use BBI's line of credit directly to pay for expenses under the oral manufacturing agreement. Dozier Dep. at 47-48, 152-53; Affidavit of Alfred J. Lebel ("Lebel Aff.") (Docket No. 29) ¶ 3. In November 1993 Dozier decided to withdraw Bates' access and asked Additon to represent to Bates that the change was based on FBOM's recommendation. *Id*. at 50-52, 100-02.

After some problems developed in the relationship between BBI and Bates, Lebel and Dozier negotiated and executed a new manufacturing agreement in April 1994. Dozier Dep. at 103-04; Lebel Dep. at 38. This agreement provided that Bates would assume the costs of raw materials and other supplies and bill BBI when the finished products were put into inventory. Dozier Dep. at 160-61. In practice, Bates for some time thereafter actually billed BBI only when the products were actually shipped to retailers, to assist BBI with its cash flow problems. Lebel Aff. ¶ 10. In early 1995 Bates sought to enforce the billing and payment terms of the written agreement. Dozier Dep. at 171-73. Asserting that BBI had failed to pay promptly, causing cash flow problems for Bates, Lebel informed BBI in the spring of 1995 that Bates intended to sell its inventory of seconds of BBI products. Lebel Dep. at 37; Lebel Aff. ¶ 13. Bates did so, selling to a retailer known as T.J. Maxx; Jerome Boucher was aware of this sale. Lebel Dep. at 37.; Lebel Aff. ¶¶ 12-13 & Exh. D. Before selling this inventory, Bates removed the "hang tags" bearing a pictorial representation of the Indian design of the article and a description of it, but did not remove labels on the blankets that gave care instructions and included the BBI logo. Lebel Aff. ¶¶ 16-17 & Exh. F.

In 1994 BBI agreed to appear in an advertisement for "Fleet Bank;" Dozier approved the advertising copy before it was published. Dozier Dep. at 30-33. After the restructuring of FBOM's line of credit to BBI, BBI continued to seek more financial assistance from FBOM. Affidavit of David Dozier ("Dozier Aff.") (Docket No. 35) ¶¶ 5-6; Boucher Dep. at 62-63. BBI contacted McConnell at his summer home. Dozier Dep. at 60, 115; Deposition of Paul R. McConnell, submitted with Fleet SMF, at 5-6, 8. BBI eventually contacted the office of Congressman Joseph Kennedy of Massachusetts, and a meeting involving representatives of FFG, FBOM, the Federal Reserve, and BBI was held in September 1995 as a result. Affidavit of James Spencer (Docket No. 37) at ¶¶ 1, 4, 6. FFG is a Rhode Island holding company which does not conduct any banking activity; FBOM is a subsidiary of FFG. Addition Aff. ¶¶ 12-13. After the meeting, CDC, another subsidiary of FFG, offered BBI a short-term $30,000 loan, which BBI rejected. Dozier Dep. at 64-65, 174. Either FFG or FBOM also paid for a consultant, chosen by BBI from a list provided by FBOM, to review BBI's financial situation. *Id*. at 56-57.

Additon met with a prospective BBI employee at Dozier's request. Dozier Dep. at 222-23; Additon Dep. at 79. This person was not hired by BBI. Dozier Dep. at 196. Bates obtained a secured $500,000 line of credit from FBOM in June 1994 which was entirely "paid out" in 1996. Additon Aff. ¶¶ 14-16.

The complaint in this action was filed on May 10, 1996. Docket No. 1.

III. Analysis

A. The Fleet Motion

After resolution of a motion to dismiss filed earlier in this action by FBOM and FFG, only Count IV, alleging fraud, remains against FFG. Remaining against FBOM are counts alleging breach of fiduciary duty (Count I), breach of contract (Count II), breach of statutory duty of good faith (Count III), fraud (Count IV), negligent misrepresentation (Count V), trademark infringement (Count X), copyright infringement (Count XI) and conversion (Count XII). In its opposition to the Fleet motion for summary judgment, BBI states that it does not oppose the motion as to Counts X - XII. Plaintiff's Memorandum of Law in Opposition to Motion of Defendants Fleet Bank of Maine, Inc. and Fleet Financial Group for Summary Judgment ("Plaintiff's Memorandum") (Docket No. 34) at 1. The motion for summary judgment will accordingly be granted as to those claims.

1. The Claim against FFG

The plaintiff states that its claim for fraud against FFG arises out of "Fleet . . . continuously representing that Fleet would provide BBI with the additional assistance necessary to save BBI's business." Plaintiff's Memorandum at 13. FFG argues that "FFG representatives did not make any specific promises to BBI concerning additional financial assistance," Motion for Summary Judgment by Defendants Fleet Financial Group and Fleet Bank of Maine, Inc. ("Fleet Motion") (Docket No. 24) at 35, and that any promises cited by the plaintiffs were not statements of existing fact but merely statements concerning an intention to do something in the future or a promise to perform, neither of which can provide a basis for a claim of fraud, as a matter of law.

The following factual assertions included in the plaintiff's Statement of Material Facts in Opposition to Motions for Summary Judgment by Defendants Fleet Bank of Maine, Inc., Fleet

Financial Group, Bates Fabrics, Inc., and Bates of Maine, Inc. ("Plaintiff's SMF") (Docket No. 39) have possible relevance to its claim of fraud against FFG. FBOM turned BBI's request for additional funds over to Patricia Hanratty, senior vice president of FFG in charge of business banking. Sloat Dep. at 21; Boucher Dep. at 43. Either FBOM or FFG or both represented strongly that they were going to provide additional financing. Boucher Dep. at 174. A government affairs officer at FFG told Congressman Kennedy's staff member that "Fleet was extremely concerned about the BBI situation and fully intended to resolve and correct the situation." Spencer Aff. ¶ 5. At the September 1995 meeting "Fleet representatives reiterated their previous representations that they were going to work with BBI to make things workable and proper for BBI if at all possible." *Id.* ¶ 7. The people at this meeting "never disagreed" that "it was going to take in the range of six figures . . . to get things back on track." Boucher Dep. at 124. At the meeting, "Fleet Bank" represented that it would hire a consultant if BBI wished "to facilitate matters," that it would contact Bates and that it would "consider the CDC providing some assistance." Sloat Dep. at 18. After the consultant "straightens [BBI] out," there was "the dangling promise," presumably made by FBOM or FFG, that "we'll figure out how to get more money here." Dozier Dep. at 56.

In order to prevail on a claim of fraud, the plaintiff must show that FFG made (1) a false representation (2) of a material fact (3) with knowledge of its falsity or with reckless disregard of whether it is true or false (4) for the purpose of inducing BBI to act in reliance upon it and that (5) BBI justifiably relied upon the representation as true and acted upon it to its damage. *Diversified Foods, Inc. v. First Nat'l Bank of Boston,* 605 A.2d 609, 615 (Me. 1992). Fraud must be proved by clear and convincing evidence, which is evidence that shows every necessary factual element of a claim to be highly probable. *Wildes v. Ocean Nat'l Bank of Kennebunk,* 498 A.2d 601, 602 (Me.

1985). A plaintiff's justifiable reliance must proximately cause financial loss. *See Gulesian v. Northeast Bank of Lincoln*, 447 A.2d 814, 817 (Me. 1982) (citing W. Prosser, *Handbook of the Law of Torts* § 110, at 731 (4th ed. 1971), discussing fraud of misrepresentation).

It is unnecessary to reach FFG's argument concerning the conditional or future-oriented nature of the allegedly false representations because BBI has included nothing in its Statement of Material Fact to support the fifth element of its fraud claim. The parties are bound by their statements of fact and may not rely, in supporting or opposing a motion for summary judgment, on facts not properly presented therein. *Pew v. Scopino*, 161 F.R.D. 1, 1-2 (D. Me. 1995). Accordingly, FFG is entitled to summary judgment on Count IV of the amended complaint.

2. The Claims Against FBOM

a. Fraud (Count IV).

BBI presents additional facts in its Statement of Material Facts to support its claim for fraud against FBOM, but none of these facts addresses the fifth element of the claim. As with the fraud claim against FFG, therefore, summary judgment for FBOM on Count IV of the amended complaint is appropriate.

b. Breach of Fiduciary Duty (Count I).

The claim for breach of fiduciary duty presented in Count I of the amended complaint requires proof of a confidential relation that would impose fiduciary duties upon the superior party. *Diversified Foods*, 605 A.2d at 614-15. A confidential relation arises when

> two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the

> influence is exerted to obtain an advantage at the expense of the confiding party.

Ruebsamen v. Maddocks, 340 A.2d 31, 35 (Me. 1975). The "salient elements" of a confidential relation are "the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties." *Id.* "Disparity of position" means "diminished emotional or physical capacity" or the "letting down of all guards and bars." *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9, 18 (1st Cir. 1987).

An ordinary bank/customer situation cannot rise to the level of a confidential relation, *id*. at 17; there is no disparity of position when the borrower has been involved for a number of years in the business for which he is borrowing from the bank, *id.* at 18.

> A good business relationship with a banker, with whom one has discussed one's underlying business at length, is not enough. Some kind of dependency for advice that makes the relationship more than a normal banker-client relationship is necessary.

In re Belmont Realty Corp., 11 F.3d 1092, 1101 (1st Cir. 1993). There must be evidence that the bank had control over the borrower's business or its day-to-day operations. *Diversified Foods*, 605 A.2d at 615. The dependence of one party upon the other must be "complete[]." *Webber Oil Co. v. Murray*, 551 A.2d 1371, 1375 (Me. 1988). The absence of a long-term relationship of trust between the borrower and the bank and the absence of loans for a purpose other than the project at issue are indicators of the lack of a fiduciary relationship. *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250 (Me. 1992).

FBOM argues that the evidence in the summary judgment record does not and cannot establish that the relationship between it and BBI was anything other than a normal bank/client relationship and that there is no evidence that BBI was completely dependent upon FBOM, to the

extent that it let down "all guards and bars." The evidence in the summary judgment record is in dispute concerning the degree of Additon's involvement in the business affairs of BBI. *Compare, e.g.*, Plaintiff's SMF ¶¶ 23-28 *with* Fleet SMF ¶¶ 12, 15-16, 18-20, 34-37. It is not at all clear from the summary judgment record that a reasonable jury could not find that BBI placed trust and confidence in FBOM to a degree that made their relationship something other than the normal bank/borrower relationship, despite the facts that there was no long-standing relationship between the two and that FBOM extended no other loans to BBI. *See Campbell v. Machias Sav. Bank,* 865 F. Supp. 26, 37 (D. Me. 1994) (denying bank's motion for summary judgment when same factors absent). The closer question is whether the record evidence could support a finding that BBI's asserted dependence on FBOM was "complete" and whether FBOM had control over the day-to-day operations of BBI's business.

Dozier owns an advertising, public relations and marketing firm in Dallas. Dozier Dep. at 9-10. David Boucher is engaged in the business of marketing and selling research on stocks in New York City. Boucher Dep. at 5, 26. He personally guaranteed the $250,000 line of credit extended to BBI by FBOM with at least $450,000 in cash and securities. Boucher Dep. at 64, 86. Jerry Boucher, who had worked in advertising, marketing and banking, was the one of the three owners of BBI who devoted his time to management of BBI, although he lived in Arizona. Dozier Dep. at 16, 18-19, 94. In connection with the second element of the *Ruebsamen* test, BBI offers the testimony of David Boucher that all three owners of BBI had "almost daily" telephone contact with Additon, although the majority of these conversations involved Dozier, Boucher Dep. at 32; BBI's owners were naive, *id.* at 151-52, 154; Additon acted on behalf of BBI at several meetings with Bates, *id*. at 72; the relationship between Additon and BBI was "very dependent," *id*. at 80; and he

assumed, when Additon did not recommend that BBI hire the individual it was considering to be its local representative in Lewiston, that Additon would continue to fill that role, *id.* at 77-78.

BBI also offers the testimony of Dozier, who said: "I kind of relied on [Additon] as my eyes and ears in Lewiston," Dozier Dep. at 24; Additon was "our guy in Lewiston . . . my watchdog . . . my coach, my mentor," *id.* at 23; "Additon was our man. He was our captain of our team, and -- and we relied on him. As long as he was there, everything was all right," *id*. at 92; Additon "helped me make decisions," *id*. at 99; Additon "knew a lot about who we were selling and how it was going," *id*. at 49; Additon agreed that BBI should end the arrangement under which Bates could draw on BBI's line of credit, *id*.; Additon told Bates, in Dozier's presence, to weave an inventory of BBI products, *id.* at 71, 78; Additon participated in setting the prices of the blankets, *id.* at 26; Additon wanted BBI and Bates to reduce their agreement to writing, *id*. at 104; Additon suggested that BBI hire a person to be a salesperson and be housed at Bates, *id*. at 93; Additon interviewed a person Dozier was considering for this job and advised against hiring him, *id*. at 197; he believed that Additon's presence in Lewiston meant that Bates would be compelled to do what Lebel said it would do, *id*. at 220, because Lebel would obey Addition but not necessarily do what he told Dozier he would do, *id*. at 79; and he appeared in a Fleet advertisement at Additon's request because "I would have done anything for Ken Additon that he asked me to do," *id.* at 32.

None of this testimony establishes that BBI's dependence on FBOM was complete or that FBOM was in control of BBI's business. Indeed, Boucher testified that Dozier was in charge of the day-to-day financial operation of the business. Boucher Dep. at 50, 85. He denied that Addition was involved in the day-to-day issues of the business, *id.* at 72, and that Additon was in control of production plans, *id.* at 110. Dozier testified that he (Dozier) was running BBI. Dozier Dep. at 218.

There is no evidence in the summary judgment record from which a jury could conclude that BBI let down all guards in its dealings with FBOM, as represented by Additon. In fact, when Dozier concluded that Additon "had lost a sense of urgency" about BBI, he wrote to Additon's superior, and communication between BBI and FBOM "swung . . . over" to Sloat. Dozier Dep. at 28-29, 71. BBI offers no evidence in its Statement of Material Facts that would indicate that Sloat exercised any control over BBI. The evidence in the summary judgment record compels the conclusion that BBI was not completely dependent on FBOM. Therefore, FBOM is entitled to summary judgment on Count I of the amended complaint.

c. Breach of Contract and Breach of Statutory Duty of Good Faith (Counts II and III).

In response to FBOM's argument that BBI has failed to identify any term of an existing contract between the parties that FBOM is alleged to have breached, BBI states that both Count II and Count III "are predicated upon FBOM's failure to act in good faith with regard to its loan to BBI." Plaintiff's Memorandum at 20. BBI apparently contends that a separate implied contractual obligation arises out of the statutory good faith obligation set forth at 11 M.R.S.A. § 1-203 for contracts subject to the Uniform Commercial Code. I assume only for purposes of the motion for summary judgment, as do the parties, that the Uniform Commercial Code applies to the loan arrangement between BBI and FBOM.

The statute provides, in its entirety: "Every contract or duty under this Title imposes an obligation of good faith in its performance or enforcement." 11 M.R.S.A. § 1-203. "Good faith" is defined as "honesty in fact in the conduct or transaction concerned." 11 M.R.S.A. § 1-201(19). The commentary to section 1-203 provides in relevant part as follows:

> This section does not support an independent cause of action for failure to

> perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

11 M.R.S.A. § 1-203, Uniform Commercial Code Comment. Thus, Counts II and III of the amended complaint do not state independent causes of action but rather state the same claim in somewhat different fashion. In addition, identification of some specific duty or obligation under the contract that has not been performed or enforced in good faith appears to be essential to the cause of action.

BBI submits two instances which it claims "demonstrate[] that FBOM's motives were less than proper with regard to the conduct surrounding the loan agreements": the advertisement using Dozier's testimonial and FBOM's loan to Bates in 1994 at the time of the restructuring of its line of credit with BBI. Plaintiff's Memorandum at 20. In neither case does BBI indicate how these activities by FBOM related to any specific term of its contract with BBI. BBI cites no authority other than section 1-203 in support of its argument.

The "honesty in fact" good-faith requirement of section 1-203 does apply to the relationship between banks and borrowers. *Diversified Foods*, 605 A.2d at 613. Improper motivation can constitute a violation of this implied duty. *Id*. at 614. BBI does not suggest how FBOM violated any duty to BBI in the two activities it describes in connection with this claim. If it means to assert that FBOM had a duty to disclose information about its loan to Bates, *see First NH Banks*, 615 A.2d at 251 (bank had no duty to disclose information about status of sellers' development project on land adjacent to that which purchaser financed through bank), BBI fails to identify the source of that duty

or indeed any connection between a refinancing of BBI's line of credit "that strengthened FBOM's security on BBI's loan," Plaintiff's Memorandum at 20, and FBOM's extension of credit to Bates. *See FDIC v. S. Prawer & Co.*, 829 F. Supp. 439, 447 (D. Me. 1993) (failure to sufficiently allege duty to disclose results in failure to allege enough to support claim for violation of duty of honesty in fact). BBI does contend that CDC required $22,000 of its proffered $30,000 loan be paid to Bates, but that loan offer was rejected by BBI, so it cannot provide the basis for a breach-of-contract claim. BBI states in conclusory fashion that "FBOM used BBI . . . to further secure a loan it made to Bates," Plaintiff's Memorandum at 21, but it does not explain how the restructuring of its line of credit served this purpose or why such a purpose would either violate any term of the contract between FBOM and BBI or necessarily demonstrate bad faith on the part of FBOM.

The relationship between the terms of any contract between FBOM and BBI and the advertisement is even more attenuated. Indeed, it appears that the advertisement was developed and published by FFG, not FBOM. Dozier Dep. at 32-33 ("Fleet" was going to run ad throughout New England; "Fleet" was merging with Shawmut); Dozier Aff. ¶ 10 (ad was part of nationwide campaign). BBI alleges that several facts in the advertisement were misrepresented, but does not suggest how that misrepresentation affected the contract relationship in any way. While FBOM, if it acted in connection with the publication of the advertisement at all, may not have exercised "honesty in fact" with regard to all representations contained therein, the court is left without guidance as to how that lack of honesty occurred in the "transaction concerned," namely, the terms of the credit arrangement between BBI and FBOM.

On the evidence presented by BBI in the summary judgment record, FBOM is entitled to summary judgment on Counts II and III of the amended complaint.

D. Negligent Misrepresentation (Count V).

The final count asserted against FBOM raises a claim of negligent misrepresentation. An essential element of this claim is detrimental reliance. *Gayer v. Bath Iron Works Corp*., 687 A.2d 617, 621 (Me. 1996). As is the case with the allegation of fraud in Count IV, BBI's Statement of Material Facts is devoid of a reference to any detrimental reliance on the alleged misrepresentations of FBOM. Accordingly, summary judgment will be entered on this count as well.

B. The Bates Motion

Bates does not seek summary judgment on Count IX, which alleges breach of contract, or on its counterclaim. It seeks summary judgment on Counts X, XI, and XII, all of the other counts alleged against it in the amended complaint.

1. Trademark and Copyright Infringement (Counts X and XI)

Bates's argument on these claims, brought under 15 U.S.C. § 1114 and 17 U.S.C. § 106, is identical. It contends that it sold only BBI inventory, with BBI's labels stating fiber content and care instructions, after notification to BBI, as a means of self-help that is allowed under the Uniform Commercial Code, specifically 11 M.R.S.A. §§ 2-703(4) and 2-706(1). The parties spend considerable time and effort discussing the quality and admissibility of BBI's evidence that its blankets were sold by Bates, but that dispute is irrelevant under the case law cited by Bates.

Bates asserts that a self-help sale after a breach of contract cannot infringe a copyright or a trademark, as a matter of law. BBI responds that the fact that Bates has not obtained a judicial determination on its counterclaim for breach by BBI means that this argument is unavailable to Bates. However, in *McCoy v. Mitsuboshi Cutlery, Inc.*, 67 F.3d 917 (Fed. Cir. 1995), the Federal

Circuit, basing its analysis on section 2.706(a) of the Texas Uniform Commercial Code, which is identical to section 2-706(1) of the Maine Uniform Commercial Code (11 M.R.S.A. § 2-706(1)), held that no adjudication of breach is necessary before resale. 67 F.3d at 922-23. *McCoy* involved a claim of trademark infringement. The *McCoy* opinion relies on *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 855 (2d Cir. 1963), which dealt with the same issue in the context of a copyright infringement claim. The *McCoy* court found it significant that the plaintiff, having received notice of the defendant's intent to resell, as did BBI here, Lebel Dep. at 37; Lebel Aff. ¶ 13 & Exh. D, took no steps to prevent the defendant from doing so. 67 F.3d at 923. I find the Federal Circuit's reasoning to be persuasive. Bates is entitled to summary judgment on the claims for trademark and copyright infringement arising out of its sale of BBI inventory.

2. Conversion (Count XII)

Bates contends that it is entitled to summary judgment on this count because the affidavits of Lebel and Nancy Pulk, a Bates employee "performing a variety of financial duties" who was responsible for billing BBI under the agreement between the parties, Affidavit of Nancy Pulk (Docket No. 30) ¶¶ 2, 8-9, establish that BBI's "complaint of continuing manufacture by Bates of BBI's-designed blankets, and Bates' surreptitious sale of such blankets are totally without factual foundation." Memorandum of Law in Support of Motion of Defendants Bates Fabrics, Inc. and Bates of Maine for Summary Judgment on Counts Ten, Eleven and Twelve of Plaintiff's Amended Complaint (Docket No. 31) ("Bates Mem.") at 10. BBI responds that recent sales of its blankets without its knowledge, including sales on the QVC television network, Dozier Aff. ¶ 29, indicate

that significant quantities of the blankets are being sold, possibly in excess of any inventory that remained when the parties' relationship broke down, and that Bates has not applied the income from such sales to any outstanding amounts alleged by Bates to be owed by BBI, *id*. ¶¶ 30-31. The summary judgment record demonstrates the existence of disputed material facts concerning the conversion claim, which under Maine law requires proof of a property interest in the goods at issue, the right to their possession at the time of the alleged conversion, and, when the holder has acquired possession rightfully, a demand by the person entitled to possession and a refusal by the holder to surrender them. *Doughty v. Sullivan*, 661 A.2d 1112, 1122 (Me. 1995). Bates addresses none of these elements directly, and its brief, conclusory argument on this point consists mainly of an assertion that BBI's allegations are "wrong" and "totally without factual foundation." Bates Mem. at 10. Such a submission is insufficient to support summary judgment for Bates on Count XII of the amended complaint.

IV. Conclusion

For the foregoing reasons, the motion for summary judgment of defendants FFG and FBOM is **GRANTED**. The motion of the Bates defendants for summary judgment is **GRANTED** as to Counts X and XI of the amended complaint and otherwise **DENIED**. Remaining for trial are Counts IX (breach of contract) and XII (conversion) against the Bates defendants, and the counterclaim of the Bates defendants against BBI.

Dated at Portland, Maine this 11th day of September, 1997.

David M. Cohen
United States Magistrate Judge